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NO. 85-5141

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

ROGER LEROY DEGARMO,
A/K/A QUINTON EARL COMBEST,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE TEXAS RULE THAT AN ADMISSION OF GUILT AT THE PUNISHMENT PHASE OF THE TRIAL WAIVES THE RIGHT TO CHALLENGE THE SUFFICIENCY OF THE EVIDENCE ON APPEAL DEPRIVES PETITIONER OF A MEANINGFUL APPEAL IN VIOLATION OF THE FOURTEENTH AMENDMENT?

II. WHETHER THE JURY WAS PROPERLY INFORMED OF THE PLEA BARGAIN BETWEEN A CO-DEFENDANT AND THE STATE, THUS NOT DEPRIVING HIM OF HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION?

III. WHETHER, IN VIEW OF THE FACT THAT PETITIONER'S CO-DEFENDANT RECEIVED A TEN-YEAR PROBATED SENTENCE, PETITIONER'S DEATH SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, which is published at 691 S.W.2d 657 (Tex. Crim. App. 1985), is reproduced as the Appendix to the Petition for Writ of Certiorari. The Texas Court of Criminal Appeals denied the Motion for Rehearing on April 24, 1985.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner bases his claims upon the sixth, eighth and fourteenth amendments to the United States Constitution.

STATEMENT OF THE CASE

The record reflects that Petitioner was indicted for the murder of Kimberly Ann Strickler while in the course of kidnapping Ms. Strickler. He was tried in the 240th District Court of Fort Bend County, Texas, on March 24-26, 1980. After a punishment hearing, the jury answered affirmatively the special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 1981). Accordingly, punishment was assessed at death. Petitioner appealed his conviction and sentence to the Texas Court of Criminal Appeals which, on March 13, 1985, affirmed the conviction and sentence. DeGarmo v. State, No. 69,027 (Tex. Crim. App. March 13, 1985) (en banc). Rehearing was denied on April 24, 1985.

STATEMENT OF FACTS

The statement of facts set forth in the Petition for Writ of Certiorari is essentially correct.

SUMMARY OF ARGUMENT

There are no special or important reasons to review this case. The Texas waiver rule does not unconstitutionally infringe on the exercise of a criminal defendant's rights. The state may legitimately require a defendant to forego one constitutional right by exercising another one. Texas' waiver rule does not go this far, however, because it does not involve an election between two constitutional rights. Moreover, even though the waiver rule could have been applied in this case, the Texas Court of Criminal Appeals did not do so, but reviewed the sufficiency of the evidence.

Petitioner's sixth amendment right to confront the witnesses against him was not violated when the jury was fully informed of the extent of the plea bargain between the state and Petitioner's co-defendant at the time the co-defendant testified. That the

plea negotiations were not fully completed until many months after Petitioner's trial does not show a violation of his constitutional rights.

Finally, the Texas capital punishment statute has been approved in the face of constitutional attack. Jurek v. Texas, 428 U.S. 262 (1976). The fact that prosecutors have discretion in deciding who to prosecute for capital offenses is merely a manifestation of the traditional role of the prosecuting authority, and not a violation of the eighth and fourteenth amendments.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reason in this case, and none exists.

II.

THE TEXAS WAIVER RULE DOES NOT VIOLATE THE FOURTEENTH AMENDMENT.

Petitioner contends that the Texas waiver rule unconstitutionally infringes upon his right to testify on his own behalf and to present mitigating evidence at punishment. The rule to which Petitioner refers is a Texas rule of appellate procedure holding that where a criminal defendant testifies on his own behalf at punishment and judicially confesses to the crime, he waives review of the sufficiency of the evidence at the guilt phase of trial. Brown v. State, 617 S.W.2d 234 (Tex. Crim. App. 1981); Smyth v. State, 643 S.W.2d 721 (Tex. Crim. App. 1982).

The Constitution does not forbid every government imposed choice in the criminal process that has an effect of discouraging the exercise of constitutional rights:

> The criminal process, like the rest of the legal system, is replete with situations

> requiring "the making of difficult judgments" as to which course to follow. Although a defendant may have a right, even of constitutional dimension, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.

Crampton v. Ohio, reported sub. nom., McGautha v. California, 402 U.S. 183, 213 (1971) (The right to remain silent is not unconstitutionally burdened by a state statute requiring a single trial in a capital murder case because it precludes the defendant from making a personal plea for mercy at punishment without risking incrimination on the question of guilt). See South Dakota v. Neville, 459 U.S. 553 (1983) (Neither privilege against self-incrimination nor due process is violated by requiring defendant to choose between taking a blood test or having his refusal used against him in court); Guenther v. Holmgreen, 738 F.2d 879 (11th Cir. 1984) (A full and fair opportunity to litigate a fourth amendment claim is not denied by requiring a defendant to choose between meaningful exercise of the privilege against self-incrimination and litigation of a § 1983 claim); Ryan v. Montana, 580 F.2d 988 (9th Cir. 1978) (Forcing defendant to assume the risk that statements made at a probation revocation and sentencing hearing will be used against him at a subsequent criminal trial is not violative of the Constitution). Cf., Jenkins v. Anderson, 447 U.S. 232 (1980) (Right to remain silent is not violated when a defendant who testifies in his own defense is impeached with evidence of pre-arrest silence); Harris v. New York, 401 U.S. 222 (1971) (Privilege against self-incrimination is not violated by impeachment with constitutionally defective confessions). Thus, requiring a criminal defendant to choose between exercising one constitutional right at the risk of restricting another is not necessarily violative of due process, as these cases indicate.

Petitioner contends that the Texas waiver rule operates to force him to choose between preserving for appeal a claim of

insufficiency of evidence at trial or to forego his right to make a personal plea for mercy to the jury. The right of a criminal defendant to seek appellate review of his trial is not a right to constitutional dimension, but rather a state created right. Evitts v. Lucey, ___ U.S. ___, 105 S.Ct. 830 (1985); Jones v. Barnes, 463 U.S. 745 (1983); McKane v. Durston, 153 U.S. 684 (1894). Being such, it is constitutionally permissible for the states to impose restrictions as long as those restrictions comport with due process. Evitts v. Lucey, ___ U.S. at ___, 105 S.Ct. at 834.

Due process requires a state that has afforded a right of appeal to make that appeal more than a "meaningless ritual." To that end, a state may not deprive a defendant of the opportunity to make an effective appeal. Ross v. Moffitt, 417 U.S. 600, 616 (1974). Nor may a defendant be deprived of effective assistance of counsel on appeal. Evitts v. Lucey, ___ U.S. at ___, 105 S.Ct. at 836. However, due process does not encompass a constitutional right to compel appointed counsel to raise every non-frivolous ground of error. Jones v. Barnes, 463 U.S. at 745. The state rule requiring Petitioner to make an election does not require Petitioner to forego one constitutional right over the exercise of another.[1]

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[1]The Texas waiver rule is strikingly similar to Fed.R.Civ.P., Rule 29(a). Under Rule 29(a), if a defendant moves for acquittal at the close of the government's case and the motion is denied, the defendant is faced with the choice of either to stand on his own motion hoping for an acquittal or to put on a defense taking the risk that he will bolster the government's case enough7 to support a verdict of guilty. I' he moves forward with a defense, he cannot on appeal complain of the erroneous denial of his motion for acquittal. United States v. Perez, 638 F.2d 862, 870 (5th Cir. 1981); United States v. Parr, 516 F.2d 458, 464 n.11 (5th Cir. 1975). This rule, like the Texas rule, requires the defendant to make a difficult strategic choice which will necessarily result in relinquishment of his right to present evidence on his behalf in order to preserve his appellate posture. This rule, again like the Texas rule, has received some judicial criticism; however, it has not been found to be constitutionally impermissible.

In addition, this is not a proper case to consider the operation of the Texas waiver rule. During the punishment phase of the trial, Petitioner did testify and admit his guilt (SF VII 29-36). On appeal, he challenged the sufficiency of the evidence to convict him. The Texas Court of Criminal Appeals declined the invitation to abandon its waiver rule but, nonetheless, did apply it in Petitioner's case. Although acknowledging that Petitioner's admissions at the punishment phase of the trial constituted a waiver of any attack on the sufficiency of the evidence, the court went on to review all of the evidence, excluding Petitioner's confession and the testimony of his co-defendant. Thus, the decision to testify at punishment did not deprive Petitioner of appellate review of the sufficiency of the evidence against him.

III.

PETITIONER WAS NOT DENIED HIS RIGHT TO HAVE THE JURY KNOW ABOUT THE PLEA BARGAIN ARRANGEMENT BETWEEN THE STATE AND HIS CO-DEFENDANT.

Petitioner's co-defendant, who was originally also charged with capital murder, testified for the state. Both she and her attorney testified that the state had agreed not to prosecute her for capital murder. Some eighteen months after Petitioner's trial, the state and the co-defendant concluded plea negotiations and the co-defendant pled guilty to murder, was placed on probation, and the proceedings against her were deferred for ten years. Petitioner maintains that this situation violated his right to have the jury informed of any agreement between the co-defendant and the state.

Under Giglio v. United States, 405 U.S. 150 (1972), the jury must be told of any agreement between the state and its witnesses concerning future prosecution. This allows the jury to consider the agreement in assessing the credibility of the witnesses' testimony. In this case, the record reflects that the jury was fully informed of the extent of the agreement between the state and the co-defendant when she testified. Nothing indicates that

the plea bargain which the co-defendant eventually accepted had been agreed to or even discussed at the time of Petitioner's trial. Petitioner has pointed to nothing which indicates that anything less than the full details of the bargain were disclosed to the jury. Moreover, Giglio has not been extended so far that the state is obligated to conclude plea bargaining with any witnesses against whom charges have been or might be brought before the witness can testify on the state's behalf. Petitioner has not shown that the circumstances complained of denied him his right to confront the witnesses against him.

IV.

THE DIFFERENCE IN THE SENTENCES RECEIVED BY PETITIONER AND HIS CO-DEFENDANT DID NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner asserts that his receiving the death penalty while his co-defendant was placed on probation is grossly disproportionate and violative of the eighth and fourteenth amendments. He also complains that the prosecutor's discretion as to who will be prosecuted for capital murder results in the death penalty being imposed in an arbitrary and capricious manner.

The disproportionality argument was rejected in Pulley v. Harris, 465 U.S. ___, 104 S.Ct. 871 (1984). Although the states are free to require proportionality review of death sentences, the Constitution does not mandate it; Id. at ___, 104 S.Ct. at 876. What is necessary to preserve the constitutionality of a capital punishment statute is a provision for finding statutory aggravating factors before imposing a sentence of death and mandatory appellate review once the sentence is assessed. Id. at ___, 104 S.Ct. at 878-79. The Texas capital punishment statute has been upheld on these grounds in Jurek v.Texas, 428 U.S. 262 (1976), and was reaffirmed in Pulley v. Harris, 465 U.S. at ___, 104 S.Ct. at 878-79.

Nor is a system which gives unfettered discretion to the prosecutor to determine who will be tried for a capital offense a violation of the eighth and fourteenth amendments. Gregg v.

Georgia, 428 U.S. 153, 199 (1976). It is the traditional function of the prosecutor to make such decisions and, absent a showing of vindictiveness or use of an arbitrary standard, the decisions are not subject to constitutional scrutiny. Bordenkircher v. Hayes, 434 U.S. 357 (1978). Petitioner's arguments have advanced nothing new which calls these decisions into question and which would require further review.

CONCLUSION

For these reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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